

**STATE OF MICHIGAN
SUPREME COURT**

NL VENTURES VI FARMINGTON, LLC,

Appellant-Plaintiff,

v

CITY OF LIVONIA,
A Municipal Corporation,

Appellee-Defendant.

Michigan Supreme Court: 153110

Court of Appeals.: 323144

Lower Court: 13-004863-CZ

SUPPLEMENTAL BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS FOR REVIEW

- I. DID THE MUNICIPAL WATER LIENS ACT, 1939 PA 178, MCL 123.161, ET SEQ, REVENUE BOND ACT SECTION 21(3), MCL 141.121(3), OR ANY OTHER STATUTE AUTHORIZE THE METHOD BY WHICH DEFENDANT SOUGHT TO ENFORCE COLLECTION OF THE DISPUTED LIENS?

Appellee-Defendant/Cross-Appellant says	"Yes."
Appellant-Plaintiff/Cross-Appellee says	"No."
The Court of Appeals says	"Yes."
The Trial Court says	"No."

- II. IS DEFENDANT PROHIBITED FROM COLLECTING THE DISPUTED LIENS BECAUSE DEFENDANT FAILED TO PLACE THEM ON THE TAX ROLL AS REQUIRED BY LIVONIA ORDINANCE, § 13.08.350?

Appellee-Defendant/Cross-Appellant says	"No."
Appellant-Plaintiff/Cross-Appellee says	"Yes."
The Court of Appeals says	"No."
The Trial Court says	"Yes."

INTRODUCTION

On February 1, 2017, this Court entered an order (the “Order”) requesting briefing – in anticipation of oral argument – on two issues in the instant case:

(1) whether 1939 PA 178, MCL 123.161 *et seq.* [hereafter the “Municipal Water Liens Act, or simply the “Act”], MCL 141.121(3) [Section 21(3) of 1933 PA 94, MCL 141.101 *et seq.*, hereafter known as “Act 94” or the “Revenue Bond Act”], or any other statute authorized the method by which defendant sought to enforce collection of the disputed liens¹; and if there was statutory authority (2) whether defendant is prohibited from collecting the disputed liens because defendant failed to place them on the tax roll each year² as required by Livonia Ordinance § 13.08.350.³

As will be demonstrated, the answer to the first question is a resounding “Yes,” given the plain language of the statutes, as well as their structure and background. And the answer to the second question is an equally firm “No.” Collection of water bills is a good thing from many perspectives. It helps finance what is possibly the most critical public service. It protects the bondholders on whom our system of public finance depends. And it shields citizens of Michigan communities from having to pick up the slack for deadbeats. Most pertinently, collection of water bills is the goal of the Municipal Water Liens Act and a primary objective of the Revenue Bond Act.

¹ Put simply, was the method by which defendant sought to enforce collection of the disputed liens authorized by statute?

² It is not clear what is meant by the phrase “each year” in the context of Defendant’s failure to place the disputed liens on the tax roll. If it is intended to imply that there was more than one such occurrence, that implication is not supported by the record in this case, as will be shown in the abbreviated Statement of Facts below.

³ This was a revision to the original Order, which cited Livonia Code of Ordinances Section 13.08.300. (The two ordinance sections are attached hereto as Exhibit A.) As thus revised, this question may be restated as “Did the City’s temporary suspension of the tax lien process invalidate or waive the lien?”

STATEMENT OF MATERIAL FACTS

I. Plaintiff's Lease with Awrey

Plaintiff-Appellee NL Ventures VI Farmington, LLC, a Delaware limited liability company (also called "Plaintiff" herein) was the landlord under a Lease Agreement with Awrey Bakeries LLC ("Awrey").⁴ The Lease gave Awrey the right to use Plaintiff's property at 12301 Farmington Road in Livonia for a basic annual rent ranging from \$950,000 in the first year to \$1,748,350 in 2037-2038.⁵ Not surprisingly, in light of these sums, Plaintiff, along with Awrey, acknowledged being sophisticated and experienced in real estate transactions.⁶

The reason the Lease matters to the question at hand is that the Amendments to the Lease⁷ illustrate one process by which a creditor may seek to collect a debt. The First Amendment to the Lease, dated as of January 1, 2011, allowed Awrey to defer \$231,316.25 of the basic rent accruing during the first six months of 2011.⁸ And even though the Lease called for a security deposit of \$475,000 to secure Awrey's obligations under the Lease,⁹ the Second Amendment to Lease, dated February 1, 2012, reduced the security deposit to \$118,750.¹⁰ In the Third Amendment to Lease, dated July 1, 2012, Awrey acknowledged that it owed \$212,039.90 in deferred rent, plus

⁴ The Lease which – together with its three amendments – was Exhibit 1 to the Affidavit of Michael J. Baucus, which itself was Exhibit 4 to Plaintiff's Application for Leave to Appeal ("Plaintiff's Brief"), is attached hereto, along with Mr. Baucus' affidavit, as Exhibit B.

⁵ See Exhibit B hereto (the Lease) at 1, 3, and Exhibit C to the Lease.

⁶ Exhibit B hereto at 35.

⁷ Also part of Exhibit A hereto.

⁸ See First Amendment to Lease – Part of Exhibit B hereto – at 1 and text following the revised Exhibit C to that Amendment.

⁹ Exhibit B hereto at 33.

¹⁰ Second Amendment to Lease at 2.

\$750,123.27 for non-payment of taxes,¹¹ and Plaintiff agreed to forbear from exercising its rights under the Lease to collect those amounts.¹²

What these successive amendments illustrate is Plaintiff's earnest effort to keep alive the goose which was supposed to drop \$1,000,000 eggs in Plaintiff's basket. Plaintiff's collection process was so lenient, forbearing, and even forgiving, that Awrey could actually earn a \$10,000 credit towards its rent arrearage simply by paying its current rent on time.¹³ No doubt Plaintiff was looking forward to the day when Awrey's financial strength waxed again, making such measures unnecessary. But make no mistake – Plaintiff was endeavoring to collect the amounts owed by Awrey.

II. Defendant's Efforts to Collect Awrey's Water/Sewer Bills

So it was not only water bills which Awrey left unpaid. But Awrey was a heavy water user with a complicated payment history.¹⁴ In September, 2011, Defendant's¹⁵ Water and Sewer Board granted a "hardship" request by Awrey's CFO, giving Awrey a chance to pay off its water arrearages without accruing further penalties, and simultaneously recommending that no part of Awrey's arrearage be placed on the tax bill.¹⁶ A few months later, Defendant followed up with a

¹¹ Third Amendment to Lease at 1-2.

¹² Third Amendment to Lease at 2.

¹³ See Third Amendment to Lease at 2, para 2(D).

¹⁴ See Exhibit C hereto, a letter to the Circuit Court, along with a transaction history and summary of water balances due. The letter and supporting documents explain that Awrey had a relatively modest arrearage until 2011, such that no arrearage was old enough to be placed on the property tax bill prior to that time. Exhibit C at 1-2.

¹⁵ Defendant is also sometimes call the "City" in this brief.

¹⁶ The Resolution – Exhibit 7 to Plaintiff's Brief – is Exhibit D hereto. This is the only such resolution in the record because 2011 was the only time that both a) there was an arrearage old enough to be placed on the tax bill pursuant to Livonia Code of Ordinances Section 13.08.350, and b) the City refrained from putting an eligible Awrey water/sewer arrearage on the tax bill.

Letter of Understanding,¹⁷ signed by Defendant's Mayor and Awrey's CEO. In this document, Awrey agreed to pay all current water and tax bills as they came due, and to pay off Awrey's substantial arrearages (e.g., \$525,519.27 in water/sewer charges) in weekly installments. The Letter of Understanding concluded

In the . . . event of a material breach by Awrey, the City shall exercise all of its rights, duties, and powers to ensure payment of any and all unpaid taxes, water and sewer bills, as well as any corresponding penalties and interest.¹⁸

By June 15, 2012, the forbearance approach was under strain. A letter of that date from Jack Kirksey – Defendant's Mayor – to Messrs. Wallace and Kasoff of Awrey¹⁹ thanked Awrey for its joint efforts with AIC²⁰ to pay off the real property taxes.²¹ But more than \$240,000 in personal property tax arrearages remained, as did \$720,000 in water/sewer arrearages.²² A mere \$83,300.11 had been paid toward water bills since the September 2011 Water and Sewer Board Resolution granting Awrey's "hardship" request.²³ The Mayor reminded Awrey's officers that the Water and Sewer Board's Resolution had been premised on Awrey keeping its current bills paid.²⁴ He urged a meeting of the parties to discuss payment of the personal property and water arrearages, and said he would welcome the attendance of Plaintiff's agent at the meeting.²⁵ The Mayor concluded by reminding Awrey's officers of the favorable settlement they had received in their

¹⁷ Exhibit 6 to Plaintiff's Brief and Exhibit E hereto.

¹⁸ Exhibit E at 2.

¹⁹ Exhibit 11 to Plaintiff's Brief and Exhibit F hereto.

²⁰ This is a reference to Plaintiff. See the Lease provision regarding notice to Lessor, Exhibit B hereto at 27.

²¹ Exhibit F at 1.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Exhibit F at 1-2.

real property tax appeal against Defendant – which actually principally benefited Plaintiff, as owner of the real estate – and of Defendant’s efforts since 2010 to “creat[e] the foundation for a successful future for the Bakery.”²⁶

III. Wayne County’s Enforcement of the Lien

As the trial court proceedings were winding down in the instant case, Defendant filed a Motion for Stay Pending Appeal, against which Plaintiff principally argued that foreclosure proceedings enforcing the 2012 water liens had already begun.²⁷ Plaintiff proffered Wayne County’s Notice of Property Tax Deficiency – Exhibit B to Plaintiff’s Stay Brief and attached hereto as Exhibit H – as evidence of this proposition. See also June 6, 2014 transcript (Exhibit I) at 5. Indeed, Plaintiff asserted that Defendant was paid in full for Plaintiff’s water arrearage by Wayne County in the return of delinquent tax process in the ordinary course of business, Exhibit I at 12, subject to repayment by the City under MCL 211.87b if Defendant does not ultimately prevail. In short, Wayne County took the steps necessary to enforce the liens for water/sewer service which are at the center of this case.

LAW AND ARGUMENT

ARGUMENT I

Summary of Argument

Both the Municipal Water Liens Act, MCL 123.161, *et seq*, and the Revenue Bond Act, MCL 141.101, *et seq*, authorized Defendant’s use of the Wayne County tax lien enforcement/foreclosure process per the General Property Tax Act, MCL 211.1, *et seq*.

²⁶ Exhibit F at 2.

²⁷ Plaintiff’s Brief in Opposition to Defendant’s Motion for Stay Pending Appeal (“Plaintiff’s Stay Brief”) – Exhibit G at 3, para 5.

THE METHOD BY WHICH DEFENDANT SOUGHT TO ENFORCE COLLECTION OF THE DISPUTED LIENS WAS AUTHORIZED BY THE MUNICIPAL WATER LIENS ACT, 1939 PA 178, MCL 123.161, ET SEQ, AND REVENUE BOND ACT SECTION 21(3), MCL 141.121(3).

A. Collection of Water/Sewer Bills is a Right and Duty of Water/Sewer Utilities and a Good Thing.

The providing a sufficient water supply for the inhabitants of a great and growing city, is one of the highest functions of municipal government, and tends greatly to enhance the value of all real estate in its limits; and the charges for the use of the water may well be entitled to take high rank among outstanding claims against the property so benefited.

Provident Institution for Savings v Jersey City, 113 US 506, 516; 5 S Ct 612; 28 L Ed 1102 (1885).

As *Jersey City* made clear some 130 years ago, water and sewer service is so vital both as a public good and an enhancement to the value of real estate that nobody can “successfully controvert . . .” the validity of laws making “water rents” a “lien prior to all other encumbrances.” *Jersey City*, *supra*, at 511.

This Court echoed *Jersey City* in *Atlantic Dynamite Co v Ropes Gold & Silver Co*, 119 Mich 260, 263; 77 NW 938 (1899):

When the complainant took its mortgages, it knew what the law was. It knew that by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law.

Atlantic Dynamite, *supra*, quoting *Jersey City*, *supra*, at 515.²⁸

²⁸ *Atlantic Dynamite* dealt with a different type of statutory lien – one apparently unique to the time and place: a lien by which miners could collect their wages from insolvent mining operations. This Court not only drew inspiration from *Jersey City*, *supra*, but added that

This statute was enacted to secure . . . an efficient remedy for . . . collection . . . and the rights secured should not be frittered away by the [statutory] construction now contended for.

Atlantic Dynamite, *supra*, at 263-264. This Court specifically condemned any construction which would “interpolate” words into the statute. *Atlantic Dynamite*, *supra*, at 263.

The water collection thread of *Jersey City's* legacy was continued in *Sigal v City of Detroit*, 140 Mich App 39; 362 NW2d 886 (1985), *lv den* 422 Mich 964 (1985). As in the instant case,

plaintiffs did not dispute that the water for which they were billed was consumed.

Sigal, supra, at 41. The plaintiff in *Sigal* had purchased an apartment building with an apparently paid-up water bill, only to discover after the purchase that there was a substantial water arrearage because the meter had not been read for three years.²⁹ The *Sigal* plaintiff sought a ruling that Detroit was estopped from collecting the arrearage, but the Court declined, saying

Arguments based on equitable estoppel to avoid payment for public utility services received have been consistently rejected[.]

citing *Wisconsin Power & Light Co v Berlin Tanning & Manufacturing Co*, 275 Wis 554; 83 NW2d 147 (1957); *Goddard v Public Service Co of Colorado*, 43 Colo App 77; 599 P2d 278 (1979); *Chesapeake & Potomac Telephone Co of Virginia v Bles*, 218 Va 1010; 243 SE2d 473 (1978); *Corporation De Gestion Ste-Foy, Inc v Florida Power & Light Co*, 385 So 2d 124 (Fla App, 1980); *Laclede Gas Co v Solon Gershman, Inc*, 539 SW2d 574 (Mo App, 1976); *Haverhill Gas Co v Findlen*, 357 Mass 417; 258 NE2d 294 (1970); and *West Penn Power Co v Nationwide Mutual Ins Co*, 209 Pa Super 509; 228 A2d 218 (1967). *Sigal, supra*, at 42-43.

The City must charge consumers within each rate classification according to an equal rate. Plaintiffs' view, if accepted, might lead to increased fraud and corruption, and "would result in discrimination that for the protection of the public generally is forbidden by law". *Robert McDaniel Trucking Co Inc v Oak Construction Co*, 359 Mich 494, 501; 102 NW2d 575 (1960). To put it plainly, no one may avoid payment of a water bill merely because the city did not read the meter.

²⁹ *Sigal, supra*, at 40. The plaintiff in *Sigal* was thus more sympathetic than Plaintiff in the instant case. Plaintiff could have ascertained the amount of the arrearage in this case by consulting the official records of the water/sewer system, as the Municipal Water Liens Act directs. MCL 123.164. But the plaintiff in *Sigal* could apparently only have learned this critical information by physically checking the meter against the bills.

Sigal, supra, at 44-45. The reasoning was discussed at greater length in *Cincinnati Gas & Elec Co v Joseph Chevrolet*, 153 Ohio App 3d 95; 791 NE2d 1016 (2003):

As explained by one commentator, "The general utility rule provides that in instances of mistaken underbilling by a public utility, the erring company holds not only the right, but the obligation, to collect the underpayment. Neither the reason for the underbilling nor the impact on the customer will mitigate the effect on the operation of this rule. In refusing to rely on mistake and estoppel in the underbilling context, most courts reason that invoking equitable estoppel [and laches] against a public utility would violate the strong public policy against discriminatory rates. * * * Courts will not consider a utility's responsibility for an underbilling when determining whether the utility may collect an additional amount due from a customer. Neither negligence nor willful misrepresentation relieves the utility of the right or the responsibility to collect[.]"

Cincinnati Gas, supra, at 103-104, quoting Colton, Protecting against the Harms of the Mistaken Utility Undercharge (1991), 39 Wash U J Urb & Contemp L 99, 103-105 (footnotes deleted).³⁰

The Ohio Supreme Court has explained that any unfairness for backbilling "relates to the public served by the utility, and not just to the customers being backbilled." . . . This is because "public utilities are not like private corporations." If the utility is limited [in how much of the undercharge it can collect], the cost of the unbilled service is spread "to all the utility's customers, rather than to the customers who actually used the service the utility provided. The parties at fault do not pay, the public does."

Cincinnati Gas, supra, at 105, quoting *Norman v Pub Util Comm*, 62 Ohio St2d 345, 354-355, 16 Ohio Op3d 400, 406 NE2d 492 (1980). Even the United States Supreme Court agrees.

Regardless of the carrier's motive – whether it seeks to benefit or harm a particular customer – the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services.

American Telephone and Telegraph Co v Central Office Telephone, Inc., 524 US 214, 223; 118 S Ct 1956; 141 L Ed 2d 222 (1998). Free service – which Plaintiff seeks in this case, and the *Sigal* plaintiff sought in *Sigal, supra* – is the ultimate discriminatory rate.

³⁰ Exhibit J hereto.

The interdependence of the lines of caselaw between publicly-owned and privately-owned utilities can be seen in this Court's observation about the

“minim[al] . . . differences between the rate-making procedures of publicly-owned and privately-owned utilities.”

City of Novi v City of Detroit, 433 Mich 414, 420 n 6; 446 NW2d 118 (1989), quoting the “helpful background statement” adopted by this Court in *City of Plymouth v City of Detroit*, 423 Mich 106, 114; 377 NW2d 689 (1985). But the compatibility of public and private utility cases regarding collection is perhaps better exemplified by the spate of private utility cases cited in *Sigal, supra*, at 42-43, and the fact that *Sigal* is, in turn, cited by *Cincinnati Gas* at 103, n 14.

To relate all this to the instant case, the City is required by law to set water/sewer rates sufficient to pay all expenses of construction, administration, operation and maintenance of the system. MCL 141.121(1). And free water/sewer service is strictly forbidden. MCL 141.118, Livonia Code of Ordinances Section 13.08.300 (part of Exhibit A). Everybody is required to pay his/her/its fair share.³¹ And the City has an “obligation . . . to collect”³² because it “must charge consumers . . . an equal rate.” *Sigal, supra*, at 44. If the City does not meet this obligation,

the parties at fault do not pay, the public does.

³¹ Justice Holmes is often quoted for the proposition that “Taxes are the price we pay for civilized society.” See *Compania General de Tabacos de Filipinas v Collector of Internal Revenue*, 275 US 87, 100, 48 S Ct 100, 105, 72 L Ed 177 (1927) (Holmes, J., dissenting)[,]

Wesley v United States, 369 F Supp 2d 1328, 1331-1332 (ND Fla 2005), but nobody buys any particular quantum of government services through the payment of taxes. By contrast, the customer of a water and sewer system makes an objectively quantified purchase, not unlike the driver pulling up to the pump at the gas station or the consumer receiving electric power through a meter box. And the amount the customer pays is a proportionate share of the costs of the enterprise.

³² *Cincinnati Gas, supra*, at 103, quoting *Colton* at 103.

Cincinnati Gas, supra, at 105, quoting *Norman, supra*, at 355.³³ And *Sigal, et al*, say this cannot be allowed to happen – Plaintiff cannot be allowed to freeload off the other customers of the system. The City has the right and duty to collect from Plaintiff and, for the sake of the public, that is a good thing.

B. The Municipal Water Liens Act Authorized the City's Method of Collecting the Disputed Liens

As Judge Posner wrote in his seminal article *Statutory Interpretation -- in the Classroom and in the Courtroom*, 50 U Chi L Rev 800 (1983):

Sometimes a statute will state whether it is to be broadly or narrowly construed [footnote omitted]; more often the structure and language of the statute will supply a clue.³⁴

The Municipal Water Liens Act actually does both. First, section 7 of the Act, MCL 123.167, tells the reader how the Act is to be construed:

This act shall . . . be construed as an additional grant of power to any power now prescribed by other statutory charter or ordinance provisions[.]

Coupled with section 5 of the Act, MCL 123.165, which addresses the priority of

[t]he lien created by this act[.]

³³ As Justice Frankfurter wrote, explaining yet another Holmes quotation,

The oft-quoted observation in *Rock Island, Arkansas & Louisiana Railroad Co. v United States*, 254 U.S. 141, 143 [41 S Ct 55; 65 L Ed 188 1920], that "Men must turn square corners when they deal with the Government," does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions . . . for charging the public treasury.

Federal Crop Ins. Corp v Merrill, 332 US 380, 385; 68 S Ct 1; 92 L Ed 10 (1947).

³⁴ Posner, *supra*, at 818. As is true in other jurisdictions, this quotable article – attached as Exhibit K – has not escaped the notice of Michigan's appellate courts. See, e.g., *Selk v Detroit Plastic Products*, 419 Mich 1, 28; 345 NW2d 184 (1984) (Levin, J. dissenting); *Bray v Department of State*, 418 Mich 149, 174; 341 NW2d 92 (1983) (Levin, J. dissenting); *Taylor v Currie*, 277 Mich App 85, 106; 743 NW2d 571 (2007) (Smolenski, P.J. concurring in part and dissenting in part), quoting Justice Souter's dissent in *Custis v United States*, 511 US 485, 502; 114 S Ct 1732; 128 L Ed 2d 517 (1994).

it is clear that the Act creates a lien and grants powers which are *additional* to liens or powers created by other statutes or, for that matter, charter or ordinance provisions.

But there is more. The lien applies to any

house or other building[,] . . . lot or lots, or parcel or parcels of land upon which the house or other building is situated . . . to which . . . sewage system service or water was supplied.

MCL 123.162. And the lien

shall become effective *immediately* upon the distribution of the water or provision of the sewage system service to the premises or property supplied[.]

MCL 123.162, *supra* (emphasis added).³⁵ So the lien created by the Act is automatic. There is no requirement that the lien be perfected; to the contrary,

The official records of the proper officer, board, commission, or department of any municipality having charge of the water distribution system or sewage system shall constitute notice of the pendency of this lien.

MCL 123.164.

Moreover, the lien is essentially bullet-proof.

The lien created by this act shall . . . have priority over all other liens except taxes or special assessments whether or not the other liens accrued or were recorded before the accrual of the water or sewage system lien created by this act.

MCL 123.165, *supra*. And

a municipality's attempt to collect . . . sewage system or water rates, assessments, charges, or rentals by *any* process *shall not invalidate or waive the lien* upon the premises.

³⁵ The only “catch” is that the lien

shall not be enforceable for more than 3 years after it becomes effective.

MCL 123.162.

MCL 123.166 (emphasis added). In other words, the City's attempt to collect by any process whatsoever did not, would not, and could not invalidate the lien created by the Municipal Water Liens Act.³⁶

Observant readers of the Municipal Water Liens Act will likely conclude that there is some back story to the Act. The answer lies in the case of *Home Owners' Loan Corp v Detroit*, 292 Mich 511; 290 NW 888 (1940).

In *Home Owners' Loan Corp*, this Court invalidated the City of Detroit's water liens, citing a mistake in the drafting of Detroit's then-current charter: the provision which repealed the old Local Acts of the Legislature accidentally eliminated the statutory authority for Detroit's water liens. *Home Owners'*, *supra*, at 514, 516.³⁷ This Court said

The relief desired in this instance by the city [i.e., the authority to impose liens for water, *Home Owners'*, *supra*, at 513-514] cannot be had from the courts, but must be and has been sought from the legislature.

Home Owners', *supra*, at 516. By way of explaining how relief had been sought from the legislature, this Court added

³⁶ The specific “processes” referenced in MCL 123.166 are

Discontinu[ance of] water service or sewage system service from the premises against which the lien created by this act has accrued . . . or . . . an action for the collection of the same in any court of competent jurisdiction[.]

but use of the term “any” connotes much broader application.

“‘[A]ny[.]’ . . . to the ordinary understanding[.] implies ‘of every kind.’”

In re Forfeiture of \$5,264, 432 Mich 242, 250; 439 NW2d 246 (1989), quoting *Gibson v Agricultural Life Ins Co*, 282 Mich 282, 289; 276 NW 450 (1937).

³⁷ This Court even went so far as to invalidate Detroit's

claimed right to discontinue water service to plaintiff's premises[.]

seemingly leaving the City on the hook to keep providing water indefinitely despite the arrearages. *Home Owners'*, *supra*, at 516.

Act No. 178, Pub. Acts 1939 [the Municipal Water Liens Act] . . . approved June 8, 1939, and given immediate effect, provides a lien for water furnished by municipalities.

Home Owners', *supra*, at 516. Alas,

The act cannot be considered in our determination of the matters now in controversy, it having been enacted subsequent to the filing of plaintiff's bill of complaint.

Home Owners', *supra*, at 516. This Court, then, effectively explained both why the Municipal Water Liens Act was adopted and why the lien created by the Act is so robust.³⁸ The legislature sought to assure that the *Home Owners'* debacle would *never* be repeated.³⁹

The Act further provides that

The lien created by this act may be enforced by a municipality in the manner prescribed in the charter of the municipality, by the general laws of the state providing for the enforcement of tax liens, or by an ordinance duly passed by the governing body of the municipality.

MCL 123.163. The tax lien technique is a familiar way for local government to collect fees for services. It is used to recoup costs expended in demolishing or stabilizing dangerous buildings, MCL 125.541(6), destroying noxious weeds, MCL 247.64 (2), and remedying erosion, MCL 324.9120. And, of course, it was used vis-à-vis the water/sewer lien in the instant case when the temporary forbearance approach failed.⁴⁰

³⁸ This also explains why the Act provides that, in addition to creating a new and separate lien and new powers, it

shall be construed as . . . a validating act to validate existing statutory or charter provisions creating liens which are also provided for by this act.

MCL 123.167. It was belt and suspenders – validating the charter authority of Detroit or any other community to impose water liens while also providing a separate source of that authority, lest there be any doubt.

³⁹ And yet Plaintiff is before this Court seeking to duplicate that debacle.

⁴⁰ As this Court is no doubt aware, the Municipal Water Liens Act provides a means by which landlords, such as Plaintiff/Appellant, may avoid the lien. MCL 123.165. But Plaintiff/Appellant failed or refused to avail itself of the relief provided by the statute.

As discussed above, water/sewer lien enforcement in the instant case was achieved through Wayne County, by the authority of the General Property Tax Act. In MCL 211.107, one finds a reference to

the procedures for . . . the *enforcement of tax liens* . . . applicable to all cities[.]

MCL 211.107(1) (emphasis added), which is linked to MCL 211.108. That section provides for the return of delinquent taxes to the County after the manner of township treasurers in similar circumstances. MCL 211.108. MCL 211.55, in turn, governs the township treasurer's "return" of delinquent taxes to the County for collection. In essence, then, enforcement of tax liens by Livonia and many other cities consists of handing the lien over to the county for enforcement. As Plaintiff has acknowledged, the lien in this case was returned to Wayne County as delinquent, and enforcement proceeded from there.

In short, the Municipal Water Liens Act is that "efficient remedy for . . . collection", *Atlantic Dynamite, supra*, at 263-264, that the Legislative devised in response to the disastrous *Home Owner's Loan Corp, supra*. As such, it authorized the City's method of collecting the disputed liens.

C. The Revenue Bond Act Also Authorized the City's Method of Collecting the Disputed Liens.

The Revenue Bond Act yields – if possible – even more Posnerian clues about how it is to be construed. Under the heading "Construction of Act," MCL 141.102 says

This act shall be construed as cumulative authority for the exercise of the powers herein granted and shall not be construed to repeal any existing laws with respect thereto, it being the purpose and intention of this act to create full and complete additional and alternate methods for the exercise of such powers. The powers conferred by this act shall not be affected or limited by any other statute or by any charter, except as otherwise herein provided . . .

So there is no question that the authority, powers, and methods granted and discussed in the Revenue Bond Act are cumulative – separate from and in addition to – the lien created by the Municipal Water Liens Act and the attributes ascribed to that lien in the Act.

But there is more. Although bond issuance, security, and payment are of course major themes of the Revenue Bond Act,⁴¹ MCL 141.104(e) contains the appended proviso that

The powers in this act granted may be exercised notwithstanding that no bonds are issued hereunder.⁴²

So even if the City had not issued water and sewer bonds, these cumulative powers would still be available.

Turning to MCL 141.134, with its semi-redundant title “Liberal Construction of Act,” the reader finds another strong statement of legislative intent:

This act, being necessary for and to secure the public health, safety, convenience and welfare of the . . . cities . . . of the state of Michigan, shall be liberally construed to effect the purposes hereof.

Undoubtedly this call for liberal construction stems from the “Immediate Necessity”⁴³ felt by the Legislature, as expressed in MCL 141.136:

This act, being necessary for and to secure the public health, safety, convenience and welfare of the . . . cities . . . of the state of Michigan, shall be given immediate effect.

And of course all this plays out against a constitutional backdrop which includes Const 1963, art 7, § 34:

The provisions of this constitution and law concerning . . . cities . . . shall be liberally construed in their favor.

⁴¹ See, e.g., MCL 141.105-128.

⁴² *Sabaugh v Dearborn*, 384 Mich 510, 517; 185 NW2d 363 (1971).

⁴³ This is the caption of MCL 141.136.

The Revenue Bond Act is much longer than the Municipal Water Liens Act partly because the Revenue Bond Act authorizes public corporations to finance and operate a much broader array of public improvements. MCL 141.103-104. Many of these services cannot feasibly be funded through bills to/liens on premises served – as is typically done in the water/sewer context – because they do not involve services provided to individual premises. These would include parks, parking facilities, harbors, bridges, stadiums, hospitals, airports, and many other public improvements listed in MCL 141.103(b). This is why the original Revenue Bond Act did not provide for liens on premises served,⁴⁴ and why the lien on premises served is optional – requiring the adoption of an ordinance – rather than automatic, like the Municipal Water Liens Act lien.⁴⁵ Liens are nevertheless an integral part of the statutory scheme. In addition to the authority to adopt ordinances to insure the security of Act 94 bonds,⁴⁶ sections 8 and 9 of the Revenue Bond Act –

⁴⁴ Exhibit L (original Act 94). This also explains why the Revenue Bond Act was not discussed in *Home Owners' Loan Corp, supra*.

⁴⁵ As in *Saginaw Landlords Ass'n v City of Saginaw*, unpublished opinion per curiam of the Court of Appeals, decided November 2, 2001 (Docket No. 222256), at 5; 2001 Mich App LEXIS 2413, attached as Exhibit M,

The [City's] ordinance adopts the permissive lien created by the [Revenue Bond Act]

Saginaw Landlords, supra, at 5, while

defendant was not required to adopt the provisions of the [Municipal Water Liens Act] in order to benefit from the lien it created.

Saginaw Landlords, supra, at 6. Granted, *Saginaw Landlords* is unpublished, but its primacy in the interpretation of these provisions was acknowledged by the federal court in *Brown Bark I, LP v Traverse City Light & Power Dept*, 736 F Supp 2d 1099, at 1104, n.2 (WD Mich 2010), affd at 499 Fed Appx 467; 2012 U.S. App LEXIS 18898, and *Saginaw Landlords* was also cited in the original unpublished Court of Appeals opinion in the instant case. *NL Ventures VI Farmington, LLC v City of Livonia*, unpublished opinion per curiam of the Court of Appeals, decided December 22, 2015, (Docket No. 323144), 2015 Mich App LEXIS 2506 at 18, n 4 attached as Exhibit N.

⁴⁶ MCL 141.106.

MCL 141.108-109 – impose a statutory lien in favor of bondholders on the net revenues⁴⁷ of any improvement financed under Act 94. MCL 141.109 goes on to say, in pertinent part, that

The holder of the bonds, representing in the aggregate not less than 20% of the entire issue then outstanding, may protect and enforce the statutory lien and enforce and compel the performance of all duties of the officials of the borrower, including the . . . the collection of revenues[.]

Thus the statutory remedy for untimely or otherwise deficient collection efforts is for the “holder of the bonds” to “compel performance.” A further remedy – if the situation deteriorates to the point that bond payments are missed – is the appointment of a receiver, per MCL 141.110.

For public improvements which provide service to customers at their homes or places of business, such as water/sewer service; light, heat or power; or cable television systems, the prime building block for the statutory lien on net revenues is the lien on individual premises served pursuant to MCL 141.121(3). And if Plaintiff is allowed to escape those liens in this case, the effect will be to “punk” the bondholders, by rendering their investment less secure, and/or other water/sewer ratepayers because – per MCL 141.107(2) and 141.121(1) and (2) – ratepayers are the sole revenue source for bond payments and other costs of the system. These liens are therefore necessary and beneficial, and the Revenue Bond Act, like the Municipal Water Liens Act, is a pro-collection, and therefore pro-lien, statute.

MCL 141.121(3) addresses the mechanics of collection. Under this provision, delinquencies less than six months old cannot be placed on the tax rolls. This means a large water/sewer customer like Awrey can run up a big arrearage over, say, three or four months without being placed on the rolls. But if there is an old enough arrearage, delinquencies can be placed on

⁴⁷ Net revenues are defined as “the revenues of a public improvement remaining after deducting the reasonable expenses of administration, operation, and maintenance of the public improvement.” MCL 141.103(g).

the rolls and treated like taxes. That is the general statutory framework; the details are a matter for local ordinances. MCL 141.121(3). This is where Livonia Code of Ordinances Section 13.08.350(A)⁴⁸ (“subsection 13.08.350(A)”) comes in.

Where Act 94 says

Charges for services furnished to the premises may be a lien on the premises,
MCL 141.121(3), subsection 13.08.350(A) provides that

Charges for water service constitute a lien on the property served[.]

Where Act 94 says

those charges delinquent for 6 months or more may be certified annually to the proper tax assessing officer or agency who shall enter the lien on the next tax roll against the premises to which the services shall have been rendered,

MCL 141.121(3), subsection 13.08.350(A) says

and during March of each year the person or agency charged with the management of the system shall certify any such charges which as of March 1st of that year have been delinquent six (6) months or more to the city assessor, who shall enter the same upon the city tax roll of that year against the premises to which such service shall have been rendered[.]⁴⁹

Where Act 94 provides

and the charges shall be collected and the lien shall be enforced in the same manner as provided for the collection of taxes assessed upon the roll and the enforcement of the lien for the taxes.

⁴⁸ 13.08.350 - Enforcement.

A. Charges for water service constitute a lien on the property served, and during March of each year the person or agency charged with the management of the system shall certify any such charges which as of March 1st of that year have been delinquent six (6) months or more to the city assessor, who shall enter the same upon the city tax roll of that year against the premises to which such service shall have been rendered; and said charges shall be collected and said lien shall be enforced in the same manner as provided in respect to taxes assessed upon such roll.

⁴⁹ This process was suspended for the 2011 tax year – at Awrey’s request – by recommendation of the Water and Sewer Board. See Exhibit D hereto.

MCL 141.121(3), subsection 13.08.350(A) says

and said charges shall be collected and said lien shall be enforced in the same manner as provided in respect to taxes assessed upon such roll.

Even subsection 13.08.350(B) mimics Act 94. Where Act 94 allows that

In addition to any other lawful enforcement methods, the payment of charges for water service to any premises may be enforced by discontinuing the water service to the premises[.]

MCL 141.121(3), subsection 13.08.350(B) says

In addition to other remedies provided, the city shall have the right to shut off and discontinue the supply of water to any premises for the nonpayment of water bills when due. Water services so discontinued shall not be restored until all sums then due and owing shall be paid.

The City Council's studied imitation of the lien provision of Act 94 was clearly an exercise of the optional lien power MCL 141.121(3) offers to every municipality which provides water/sewer or other utility services to individual premises.

For those arrearages which were not six months old in September 2011, Subsection 13.08.350(A) was strictly followed; they were not old enough to be placed on the 2011 tax roll, so they were not part of the Water and Sewer Board deferral.⁵⁰ However, there was a bill of \$171,679.38 on March 15, 2011, all or part of which was scheduled to go on the 2011 tax bill until the Water and Sewer Board recommended forbearance.⁵¹ Amounts timely placed on the 2012 and 2013 tax bills should be safely beyond the reach of Plaintiff's challenge in this case. The status of those portions which could have gone on the 2011 tax roll is all that is really in question here.

⁵⁰ See Exhibits C and D hereto, along with the affidavit of Deputy City Treasurer Sharon Dolmetsch, attached, e.g., as Exhibit O to Appellant's Brief on Appeal (in the Court of Appeals), and Exhibit O hereto, explaining that the arrearages were placed on the 2012 tax bill. Exhibit O, supra, at 2, paras 8-10.

⁵¹ See Exhibit C at 4-5.

Plaintiff argues – and one who knew nothing of *Sigal* and its antecedents or progeny, or *Home Owners' Loan Corp*, or the Municipal Water Liens and Revenue Bond Acts, might be inclined to agree – that the failure to timely place an arrearage on the tax bill forecloses the right to enforce the lien for that amount at a later date. But even confining the discussion to the Revenue Bond Act, careful analysis shows that the City was authorized to enforce collection of the disputed liens.

For a start, the only private right of action the Revenue Bond Act provides for untimely collection or any other grievance is an action brought by the “holder of the bonds” pursuant to MCL 141.109. Though it certainly is not hard to imagine the treasurer missing the earliest chance to place water arrearages on the tax bill through mistake, as in *Sigal*, or forbearance, as in the instant case, Act 94 does not even contemplate an action – like Plaintiff’s – to void the lien. Indeed, even an action to compel collection can only be brought by a holder of bonds who represents “not less than 20%” of the outstanding bonds. MCL 141.109, *Grand Rapids Independent Publishing Co v City of Grand Rapids*, 335 Mich 620, 630; 56 NW2d 403 (1953). Plaintiff has neither remedy nor standing under the Revenue Bond Act, i.e., no way to attack even the untimely portion of the City’s lien enforcement. This is fatal to Plaintiff’s claim for violation of Act 94 and the related ordinance.

[W]here the Legislature has explicitly provided for a limited private right of action . . . [it is] clear that in enacting the [statute] the Legislature considered whether and to what extent private rights of action unknown to the common law ought to be created, and thus that the failure to provide for [other] private rights . . . was advertent, an archetypal exemplar of the principle of *expressio unius est exclusio alterius*. *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 362; 459 NW2d 279 (1990). Therefore, . . . no cause of action based on the statute may be maintained by plaintiff. Summary disposition in favor of defendant with regard to this theory, for failure of the complaint to plead a cause of action on which relief may be granted, should have been entered by the trial court.

Claire-Ann Co. v Christenson & Christenson, Inc., 223 Mich App 25, 31; 566 NW2d 4 (1997). The fact that Act 94 offers no way to challenge the City’s method of collecting the disputed liens is yet another indicator that the City’s method is within the authority conferred by the Revenue Bond Act.⁵²

Concern for bondholders, and not for the deadbeat or his/her/its landlord, is a hallmark of the Revenue Bond Act. The bondholders have a statutory lien on the net revenues of the system,⁵³ which means their lien extends to the revenues generated by the lien in this case. So their interests align perfectly with the City’s in this litigation. Furthermore, the extraordinary remedy of receivership of a publicly owned improvement only arises in the event a bond payment is missed. MCL 141.110. Under the Revenue Bond Act, at least, no amount of abuse of customers – whether by shoddy service or ill-conceived collection or both – triggers receivership. Act 94 is pretty much exclusively concerned with the welfare of bondholders. This in itself is dispositive: Plaintiff’s whole “beef” in this case is that the City violated Act 94 and the ordinance adopted pursuant thereto, but the authors of Act 94 and the ordinance were concerned with bondholders, *not* Plaintiff.

Consider as well the prohibition on free service in MCL 141.118. Free service is precisely what Plaintiff is seeking in this case. Thus MCL 141.118 also points to the conclusion that even the untimely component of the City’s lien enforcement was authorized by the Revenue Bond Act. For that matter, even those provisions which say the amounts “delinquent for 6 months or more”⁵⁴

⁵² If this conclusion seems harsh, recall that Plaintiff, as a landlord, could have avoided liability altogether by providing the City with the notification described in MCL 141.121(3). Plaintiff’s remedy, in other words, was prospective. Otherwise, if Plaintiff truly did not know about the water arrearages – which is a stretch, given what Plaintiff knew about its tenant’s financial health – see the discussion at pp 2-3, *infra* – Plaintiff could have consulted the City about the amount of the lien, as directed by MCL 123.164.

⁵³ MCL 141.108-109.

⁵⁴ MCL 141.121(3) and subsection 13.08.350(A). This point will be revisited in Part II, *infra*.

shall be placed on the next tax roll express the necessity that the lien amount go on the tax roll, whether in timely fashion or not. Subsection 13.08.350(A) states unequivocally that

Charges for water service constitute a lien on the property served[.]

This is a statement of fact, invoking the cumulative authority conferred by Act 94. Subsequent instructions regarding placement of delinquencies on the tax roll do not negate or somehow undermine the lien; those instructions follow the word “and,” *not* “if”.⁵⁵ Nor do either the Revenue Bond Act or subsection 13.08.350(A) contain any deadline after which the charges cease to be a lien. Nor, per *Atlantic Dynamite, supra*, at 263, should such a deadline be interpolated into Act 94 or subsection 13.08.350(A). These are provisions for *enforcement* of the lien, *not defeasance* of the lien.

This conclusion accords with traditional rules of statutory interpretation.

Since the rules governing statutory interpretation apply with equal force to a municipal ordinance, the goal of construction and interpretation of an ordinance is to discern and give effect to the intent of the legislative body. The most reliable evidence of that intent is the language of the ordinance itself and, therefore, the words used in an ordinance must be given their plain and ordinary meanings.

Bonner v City of Brighton, 495 Mich 209, 222; 848 NW2d 380 (2014), *cert den* 2014 US LEXIS 5480. (Footnotes omitted.) Although

⁵⁵ This State’s courts have identified several pertinent definitions of the word “if,” e.g., “in case that; granting or supposing that; on condition that[.]”

Thus, the use of “if” . . . sets forth the alternative conditions upon which the rest of that subsection is premised.

Estate of Casey v Keene, 306 Mich App 252, 260; 856 NW2d 556 (2014), *lv den* 497 Mich 1027 (2015). Contrast this with the word “and,” the foremost meanings of which are “also; in addition; moreover; as well as.” *Webster’s New World Dictionary of the English Language* (1954). If the City Council had wanted to premise the existence of the Revenue Bond Act lien on compliance with the procedural steps for enforcement, surely the Council would have chosen the word “if,” which conveys that meaning. By choosing the word “and,” Council established the lien’s existence *and* laid out a path for enforcement.

[t]he intention of the Legislature prevails regardless of any conflicting rule of statutory construction[.] *GMAC LLC*, [*v DEPARTMENT OF TREASURY*] 286 Mich App [365,] 372[; 781 NW2d 310(2009),]

GMC v Dep't of Treasury, 290 Mich App 355, 391; 803 NW2d 698 (2010), this is one case where the plain language of the ordinance happens to coincide with the intent of City Council in adopting the ordinance. After all,

A debt is the creditor's property.

Lampe v Kash, 735 F3d 942, 943 (CA 6, 2013).⁵⁶ Plaintiff would have this Court believe that City Council intended – without actually stating the intention – that this property of the City be forfeited outright if for any reason the enforcement procedures in the ordinance were not followed to the letter.

We generally presume that Congress “does not, one might say, hide elephants in mouseholes.” *Whitman v American Trucking Assns, Inc*, 531 US 457, 468, 121 S Ct 903, 149 L Ed2d 1 (2001).

Bilski v Kappos, 561 US 593, 645; 130 S Ct 3218, 177 LEd2d 792; (2010). And it is equally valid to presume that City Council did not intend to hide a disastrous consequence, such as forfeiture of City property, in a timetable provision which a) did not identify any consequence for failure to meet said timetable, and b) was adopted for the sake of the bondholders and paid-up ratepayers whose interests are protected by the Municipal Water Liens and Revenue Bond Acts generally,

⁵⁶ The same can be said for statutory liens. *County of Orange v Merrill Lynch & Co. (In re County of Orange)*, 191 BR 1005, 1018 (1996); *First of Am Bank, N.A. v Netsch*, 166 Ill 2d 165, 185; 651 NE2d 1105 (1995); *Hogue v D N Morrison Const Co.*, 115 Fla 293, 309; 156 So 377(1933).

and by timely lien enforcement in particular.⁵⁷ This case therefore resembles *Dolan v United States*, 560 US 605; 130 S Ct 2533; 177 L Ed 2d 108 (2010):

"The fact that a sentencing court misses the statute's 90-day deadline, even through its own fault or that of the Government, does not deprive the court of the power to order restitution" because (a) "the [statute's] efforts to secure speedy determination of restitution is *primarily* designed to help victims of crime secure prompt restitution rather than to provide defendants with certainty as to the amount of their liability" and (b) "to read the statute as depriving the sentencing court of the power to order restitution would harm those – the victims of crime – who likely bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit."

People v Gaston (In re Forfeiture of Bail Bond), 496 Mich 320, 333-334; 852 NW 2d 747 (2014), quoting *Dolan, supra*, at 613-614. (emphasis in the original).

In *Gaston*, this Court held that

When a statute provides that a public officer "shall" do something within a specified period of time and that time period is provided to safeguard someone's rights or the public interest, as does the statute here, it is mandatory, and the public officer who fails to act timely is prohibited from proceeding as if he or she had acted within the statutory notice period.

In re Gaston, supra, at 339-340. The *Gaston* Court cited *Dolan, supra*, as an exception to that rule because *Dolan* was the type of case in which

"time provisions are . . . directory [because] a mandatory construction might do great injury to persons not at fault, as in a case where slight delay on the part of a public officer might prejudice private rights or the public interest."

In re Gaston, supra, at 333, quoting 3 Sutherland, § 57:19, pp 73-74.

⁵⁷ [W]e see no reason to infer that the . . . statute was intended to have a separate penal effect Its basic purpose was to terminate defunct corporations and to encourage the payment of fees and the filing of reports.

Bergy Bros, Inc. v Zeeland Feeder Pig, 415 Mich 286, 297; 327 NW2d 305 (1982). Likewise in the instant case, the ordinance provision is intended to encourage the timely placement of unpaid water bills on the tax rolls. There is no reason to infer a penal effect on the interests of bondholders and paid-up ratepayers.

The instant case is easily distinguished from *In re Gaston* because, for a start, subsection 13.08.350(A) is not a “notice” provision. Notice is constructive, as the Court of Appeals pointed out. *NL Ventures v City of Livonia*, 314 Mich App 222, 236; 886 NW2d 772 (2016), citing MCL 123.164, and is thus imputed by statute to plaintiff.⁵⁸ In fact, placing a tenant’s water arrearage on the landlord’s tax bill is not a friendly gesture or service to the landlord regardless of when it is done; it is clearly detrimental to the landlord’s interests. By contrast, had the City’s forbearing approach to collection succeeded as intended, Plaintiff would have been a major – if not the principal – beneficiary, as Plaintiff never would have been charged for the deferred arrearage.

Moreover, just as the statute in *Dolan* was intended to “secure prompt restitution” rather than help criminal defendants,⁵⁹ the ordinance in question here was intended to secure prompt payment of water arrearages, *not* to shield deadbeats and their landlords. And to read the ordinance as depriving the City of the power to enforce the liens would

“harm those . . . who likely bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit.”

In re Gaston, *supra*, at 333-334, quoting *Dolan*, *supra*, at 606. Even more ironically, if Plaintiff prevails, Plaintiff gets a patently illicit benefit – free water/sewer service – while, contrary to the result in *Dolan*,

“The parties at fault do not pay, the public does.”

⁵⁸ See also *Sigal*, *supra*. It is not as if any of this is a surprise to a sophisticated real estate entity like Plaintiff. Among the elementary rules of real estate acquisition is this bit of wisdom:

You should make investigation to determine whether all of the water bills due against the premises are paid, because delinquent water bills constitute a lien against the premises regardless of the ownership of same.

Williams v American Title Ins. Co., 83 Mich App 686, 692, n 2; 269 NW2d 481 (1978).

⁵⁹ *Dolan*, *supra*, at 613, quoted in *In re Gaston* at 333.

Cincinnati Gas, supra, at 105, quoting *Norman, supra*, at 355.⁶⁰

Plaintiff has no legally cognizable interest in free water/sewer service or prompt placement of Awrey's arrearages on Plaintiff's tax bill. But Plaintiff is trying to put itself at center stage, to the derogation of the bondholders and ratepayers Act 94 and the ordinance were adopted to protect. This is manifestly not what the Legislature intended when it adopted the Revenue Bond Act, or what City Council intended when adopting subsection 13.08.350(A).

In construing the statutory language at issue, we must seek to give effect to the intent of the Legislature, *Lafayette Transfer & Storage Co v Public Service Comm*, 287 Mich 488; 283 NW 659 (1939), and in that effort we are guided by the rules of statutory construction. Where the language of a statute is of doubtful meaning, a court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose. *Webster v Rotary Electric Steel Co*, 321 Mich 526; 33 NW2d 69 (1948). In this endeavor, a court should not abandon the canons of common sense. *Bay Trust Co v Agricultural Life Ins Co*, 279 Mich 248; 271 NW 749 (1937).

Marquis v Hartford Accident & Indem., 444 Mich 638, 643-644; 513 NW2d 799 (1994).

The Revenue Bond Act authorizes construction and operation of a wide range of public improvements – including the City's water and sewer system – and creates a vehicle for financing them. This vehicle depends on the continued goodwill of the municipal bond market. So solicitude for bondholders is a recurring theme throughout Act 94. In addition to the provisions already discussed, Section 33a – MCL 141.133a – prohibits any municipality from challenging the validity of a bond issue from which it has received proceeds. And MCL 141.132 provides that even lands severed from the bond issuing jurisdiction remain

subject to the obligations created by the issuance of such bonds.

⁶⁰ Unlike the Kent County Circuit Court (see *sub nom People v Moore*, 474 Mich 919; 705 NW2d 350 (2005)) which did not keep its "end of the bargain[.]" *Gaston, supra*, at 336, n 6, the City kept its end of the bargain by providing the water/sewer service which enabled Plaintiff to lease its property to an industrial bakery for a princely sum. Plaintiff, by contrast, is attempting to escape its part of the bargain.

Put another way, the City and Plaintiff are both stuck with their obligations to the bondholders no matter what.

The key operative words of subsection 13.08.350(A), which was adopted under the authority of the Revenue Bond Act, are

Charges for water service constitute a lien on the property served, and . . .
the . . . agency . . . *shall* enter the same upon the city tax roll[.]

The Revenue Bond Act also authorized the City's method of collecting the disputed liens.

ARGUMENT II

DEFENDANT'S FAILURE TO PUT THE DISPUTED LIENS ON THE TAX ROLL, AS REQUIRED BY LIVONIA ORDINANCE, § 13.08.350, DOES NOT PROHIBIT COLLECTION OF THE LIENS.

There is considerable overlap between the questions presented in the Order. Naturally, the question whether the City's forbearance voids the lien must be informed by *Sigal* and the broader discussion of the public interest behind water liens and water bill collection. Equally important is a clear-eyed analysis of the bullet-proof lien created by the Municipal Water Liens Act. And insight into the Revenue Bond Act and its regard for bondholders is *de rigeur* in light of the fact that subsection 13.08.350(A) so closely parallels Act 94.

A. The Requirement that the City "Shall Enter" the Delinquent Charges on the Tax Roll Takes Precedence Over the Timetable in the Ordinance.

Job one in grappling with the Order's second question⁶¹ is to determine which "shall" is more important:

the . . . agency . . . *shall enter* the [delinquent charges] upon the city tax roll[.]

⁶¹ Whether defendant is prohibited from collecting the disputed liens because defendant failed to place them on the tax roll each year as required by Livonia Ordinance, § 13.08.350.

subsection 13.08.350(A) or

the . . . agency . . . *shall* enter the same . . . *that year*[.]

Ibid. If the second “shall” is exalted over the first, the Revenue Bond Act is a nullity as to the arrearage deferred in 2011 because the City did not meet the deadline.⁶² If the first “shall” is preferred, this Court should summarily affirm the Court of Appeals in this case.

Just as the word “may” sometimes means “shall,”⁶³ the word “shall” itself can have varying connotations depending on the context. This is the lesson of *In re Gaston, supra*, and *Dolan, supra*. On the facts of *Gaston, supra*, “shall” means timing is everything,⁶⁴ whereas under the *Dolan* version of “shall,” timing is secondary; the focus is on assuring that the required task is completed.⁶⁵ The difference, according to *Gaston*, is where the public interest lies. In *Gaston*, the Kent County Circuit Court took three years to deliver a notice which was statutorily required to be delivered in seven days.⁶⁶ The notification in question alerted You Walk Bail Bond Agency, Inc. (the “surety”) that Gaston, for whom the surety had posted a bail bond, had failed to appear for trial, and the bond would be forfeited as a result.⁶⁷ This Court had no difficulty figuring out where the public interest lay:

[I]n the instant case, . . . [n]ot mandating timely notice of the defendant's failure to appear might well do great injury to persons not at fault because . . . if the surety does not know that the defendant failed to appear, the surety would not . . . [begin] searching for the defendant, and . . . not only would the defendant have remained free during this period, possibly to do harm to other individuals, but the longer-term prospects of apprehension would also

⁶² It will be recalled that amounts not old enough to be eligible for inclusion in the 2011 tax bill were timely placed on the tax roll in 2012. See Exhibits C and D.

⁶³ *Smith v City Commission of Grand Rapids*, 281 Mich 235, 243; 274 NW 776 (1937).

⁶⁴ *In re Gaston, supra*, at 335-336.

⁶⁵ *Gaston, supra*, at 333-334.

⁶⁶ *Gaston, supra*, at 324.

⁶⁷ *Gaston, supra*, at 320, 323-324.

have been diminished. For this reason, the "public interest" in the instant case . . . would . . . *be* prejudiced by *not* adopting a mandatory construction. The "private rights" of the surety are also better protected by adopting a mandatory construction because . . . the surety will be discharged from its financial obligation under the bond once the surety finds and returns the defendant to the jail or the county sheriff, which will certainly be easier if the surety is promptly notified of the defendant's failure to appear.

Gaston, supra, at 334 (emphasis in original). This is pretty much the diametric opposite of the situation in *Dolan, supra*, where a criminal defendant challenged his obligation to pay restitution to the victim of his crime because the judge was 90 days outside the 90 day deadline for determining the amount of restitution owed. *Dolan, supra*, at 608-609. Here, too, the Court had little difficulty discerning the public interest.

[T]o read the statute as depriving the sentencing court of the power to order restitution would harm those--the victims of crime--who likely bear no responsibility for the deadline's being missed and whom the statute also seeks to benefit The potential for such harm--to third parties--normally provides a strong indication that Congress did not intend a missed deadline to work a forfeiture, here depriving a court of the power to award restitution to victims.

Dolan, supra, at 613-614. And the *Dolan* Court looked to those Posnerian clues:

[T]he statute's text places primary weight upon, and emphasizes the importance of, imposing restitution upon those convicted of certain federal crimes. Amending an older provision that left restitution to the sentencing judge's discretion, the statute before us (entitled "The Mandatory Victims Restitution Act of 1996") says "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of [a specified] offense . . . , the court *shall* order . . . that the defendant make restitution to the victim of the offense." § 3663A(a)(1) (emphasis added); cf. § 3663(a)(1) (stating that a court "may" order restitution when sentencing defendants convicted of other specified crimes). The Act goes on to provide that restitution shall be ordered in the "full amount of each victim's losses" and "without consideration of the economic circumstances of the defendant." [18 U.S.C.] § 3664(f)(1)(A).

Dolan, supra, at 612 (emphasis in original). By this means, the *Dolan* Court found that "shall order" outweighed "shall set a date not to exceed 90 days after sentencing." *Dolan, supra*, at 608, quoting 18 U.S.C. § 3664(d)(5).

As discussed at length above, the structure of the Revenue Bond Act leaves no doubt that it prioritizes the interests of bondholders, just as the statute in *Dolan* prioritized the interests of crime victims. Even a property owner who somehow manages to sever his/her/its property from the jurisdiction issuing the bonds remains subject to the obligations created by the bond issue. MCL 141.132. There is no reason to think the statutory scheme – or the ordinance adopted pursuant thereto – was intended to allow Plaintiff to escape over something as petty as a missed deadline.

But there is more. The City has an obligation to collect the disputed lien amounts,⁶⁸ because it must charge consumers an equal rate⁶⁹ and avoid providing free service.⁷⁰ As Ohio's courts have observed, if the money is not collected from Plaintiff,

The parties at fault do not pay, the public does.⁷¹

So the public interest clearly favors collection in this case.

Sigal, supra, offers yet another way in which the public interest is served by collection from Plaintiff of the disputed lien amounts.

Plaintiffs' view, if accepted, might lead to increased fraud and corruption[.]

Sigal, supra, at 44. This is a concern also seen, albeit in a somewhat different context, in *Taylor v Auditor General*, 275 Mich 47, 51; 265 NW 772 (1936):

Whether from good or bad motives, a sale on understanding for credit amounts to collusion between the treasurer and prospective purchaser to violate the law. It opens the door to unlawful preference of purchasers, to virtual fraud upon landowners and upon prospective buyers, and has a tendency to discourage the latter to the general detriment of tax sales.

⁶⁸ *Cincinnati Gas, supra*, at 103.

⁶⁹ *Sigal, supra*, at 44.

⁷⁰ MCL 141.118.

⁷¹ *Cincinnati Gas, supra*, at 105, quoting *Norman, supra*, at 355.

Taylor concerned a county tax sale at which some real estate purchases were on credit – equivalent, perhaps, to land contracts – involving payments received long after the 24 hour statutory period for payment in full. *Taylor, supra*, at 49. This Court noted the potential for improprieties in such a proceeding. Public officials might be tempted to favor their friends with the opportunity to acquire public lands without paying. Or such officials might be amenable to bribes from shady characters looking for sweetheart deals on real estate. The parade of horrors included situations in which

the landowner is deprived of an opportunity to pay, other tax purchasers to buy, or . . . other circumstances where violation of the law worked injury or injustice.⁷²

And if the county received no money at the sale or in its immediate aftermath, the process would lose transparency.

Sigal saw a similar potential in a regime where parties are excused from paying water bills due to tardy enforcement efforts by the responsible officials. *Sigal, supra*, at 44. If forbearance in collection can result in the loss of water liens, forbearance becomes a valuable commodity. Officials might collude with friends or individuals or entities with ready cash to forbear, and thereby forfeit the water lien. As the instant case demonstrates, the right water lien can be worth a small – or not so small – fortune, and it is important to preserve that value for the

⁷² Interestingly, *Taylor* made its own – possibly obsolete – distinction between mandatory and directory deadlines. In transactions in which there was no danger of collusion because the purchaser was ready and willing to make timely payment, but was unable to do so through no fault of his own, this Court ruled that the deadline was directory, in line with the

weight of authority . . . that the statutory requirement for payment of taxes within a specified time is directory.

Taylor, supra, at 51.

public, to which it rightfully belongs. To facilitate this desirable outcome, it is necessary to uphold the sanctity of water liens, including the liens in this case, notwithstanding tardy enforcement.

B. The Municipal Water Liens Act Provides Separate and Sufficient Authority for the Enforcement of the Disputed Liens Notwithstanding the Timeliness Issue.

Plaintiff may argue – perhaps on the authority of *Lathrop*⁷³ – that *Dolan, supra*, will never be the law in Michigan, so the public will just have to take the loss on this one in order to make a point about statutory construction or to punish unauthorized forbearance or – and frankly, this is the real reason – so Plaintiff can avoid taking the hit. Presumably this Court cited *Dolan, supra*,⁷⁴ because its reasoning is persuasive, but even if *Dolan* is a sign that the U.S. Supreme Court has gone soft, Plaintiff still has one insurmountable obstacle: the bullet-proof lien created by the Municipal Water Liens Act.

The legal regime under which *Home Owners' Loan Corp* was decided is gone⁷⁵ and apparently unmourned. The drafting error which allowed Detroit's water liens to go unenforced was corrected, albeit only prospectively, by a remarkable statute: the Municipal Water Liens Act.⁷⁶

As discussed at length above,⁷⁷ the Municipal Water Liens Act appears to have been designed to correct any imaginable problem with the enforceability of municipal water liens. The Act creates its own lien and endows it with a superpriority. MCL 123.165. The lien attaches

⁷³ *Agent of State Prison v Lathrop*, 1 Mich 438, 444 (1850), discussed in *Gaston, supra*, at 328-330, 335-336.

⁷⁴ *Gaston, supra*, at 333.

⁷⁵ This includes *Home Owners'* harsh statement of Dillon's Rule, *supra*, at 515 – which has been replaced by, for example, Const 1963, art 7, § 34.

⁷⁶ *Home Owners'*, *supra*, at 516.

⁷⁷ See Part I B above.

automatically the moment service is provided. MCL 123.162. There is *never* a notice issue because

The official records of the . . . municipality having charge of the water distribution system or sewage system shall constitute notice of the pendency of this lien.

MCL 123.164. The Act permits enforcement in the manner in which tax liens are enforced, MCL 123.163, i.e., the manner used in this case. And the municipality may collect water/sewer bills via a variety of processes but its attempts to collect

by *any* process *shall not invalidate or waive the lien* upon the premises.

MCL 123.166 (emphasis added).

This last point bears repeating, because Exhibit E, the Letter of Understanding between Mayor Jack Kirksey and Awrey's CEO, bears a striking resemblance to the Amendments to Plaintiff's lease with Awrey, which are part of Exhibit B hereto. Both the Letter of Understanding and the lease amendments postponed consequences, such as eviction and placement of the water liens on the tax roll, that Awrey's poor payment record arguably did not justify. So perhaps in hindsight, these forbearances seem foolish. But they appear to have been motivated by a belief that Awrey would turn itself around and become the kind of tenant and taxpayer/ratepayer that Plaintiff and Defendant both hoped and believed Awrey could be. Both the creditors in this case recognized Awrey might be unable to continue operations, and thus generate cash to pay bills, if pushed too hard. So each sought – no doubt somewhat warily – to fit their collection processes to the situation at hand. And this is where MCL 123.166 comes in.

Plaintiff filed this action to void the lien in this case on the basis that the City's process for collection – which included forbearance eerily similar to that exercised by Plaintiff – waived

or otherwise invalidated the lien. This is precisely what MCL 123.166 says Plaintiff can *not* do. The lien created by the Municipal Water Liens Act is bulletproof.

Finally, lest there be any suggestion that City Council's adoption of subsection 13.08.350(A) somehow supplanted or killed the bullet proof Municipal Lien Acts lien, ordinances do not work that way.

Local ordinances cannot override statutes[.]

Staley v Winston-Salem, 258 NC 244, 249; 128 SE2d 604 (1962).⁷⁸ But even if some ordinance somewhere could somehow override a statute, the Municipal Water Liens Act cannot be overridden because the Act explicitly directs that it be construed

as an *additional* grant of power to any power now prescribed by other statutory charter or ordinance provisions[.]

MCL 123.167 (emphasis added). This scarcely requires further elucidation, but this Court did further elucidate the concept of an additional power in *Sinas v Lansing*, 382 Mich 407; 170 NW2d 23 (1969).

Plaintiff cites a charter limitation upon the city's power to convey real estate without the approving vote of a majority of the electors of the city voting on the proposal to sell. [Citation omitted.]

PA 1945, No 344, § 13 (MCLA § 125.83 . . .) provides, in part:

"The powers granted in this act shall be in addition to powers granted to municipalities, the local legislative bodies thereof and other officials and bodies thereof under the statutes and local charters."

If the charter of the city completely prohibited the sale of real estate by the city council, with or without referendum, it is clear that PA . . . 344 would empower the city to sell and convey urban renewal lands "under terms and

⁷⁸ See also *ter Beek v City of Wyoming*, 495 Mich 1, 20; 846 NW2d 531 (2014):

[T]he ordinance [cannot] permit . . . what the statute prohibits or . . . prohibit . . . what the statute permits."

ter Beek, *supra*, quoting *People v Llewellyn*, 401 Mich 314, 322 n 4, 257 NW2d 902 (1977).

conditions fixed by the local legislative body." (Section 6 [MCLA § 125.76, . . .].) That the city council already has a limited power of sale does not prevent the statute from having the same force.

Sinas, supra, at 414-415. As applied to this case, even if the City's charter or ordinances altogether forbade the City from holding or enforcing water/sewer liens, the Municipal Water Liens Act would empower the City to do so. The fact that the City has, through subsection 13.08.350(A), a lien and the means to enforce it,

does not prevent the [Municipal Water Liens Act] from having the same force.

The Municipal Water Liens Act lien can "age out,"⁷⁹ but until that happens, it is immortal. Compliance or noncompliance with subsection 13.08.350(A) cannot kill the lien and does not prohibit Defendant from enforcing it.

CONCLUSION

This State could have decided – and may yet decide – that water is a human right and should be distributed without cost to the user through a taxpayer-funded system. But as of this writing, that is not the system Michigan has. In Michigan's water distribution scheme, each user pays for the water he/she/it consumes, and the Revenue Bond Act requires that those user payments finance the entire cost of construction, operation, maintenance, and administration of the water/sewer infrastructure.⁸⁰ Indeed, the law actually prohibits free service.⁸¹ Every step of the way, the law assumes and promotes the idea of users paying their own way.

At least two statutes – each a separate and additional grant of power and authority to municipalities – provide for liens on real property to secure user payments of water/sewer bills.

⁷⁹ The lien has a three-year statute of limitations. MCL 123.162

⁸⁰ MCL 141.121(1)

⁸¹ MCL 141.118.

Both of these statutes authorized Defendant's method of collecting the disputed liens. Both authorized Defendant's request that Wayne County enforce the liens in the same way it enforces tax liens.

Plaintiff, in its endeavor to escape the force of the liens, questions Defendant's decision to forbear – at the request of Plaintiff's tenant – from billing Plaintiff/handing the lien over to the County in 2011.⁸² This forbearance collection process violated the timetable provision in the City's Revenue Bond Act Ordinance, subsection 13.08.350(A), but it parallels Plaintiff's own approach to collection. And the Municipal Water Liens Act says no approach to collection can void or invalidate the lien. Besides, given the imperative to collect from users and the structure and language of the statutes, it is clear that both the Legislature and the City Council assigned primacy to the enforcement of the liens over strict compliance with the timetable.

As the United States Supreme Court has observed, providing water for the City is one of the "highest functions of municipal government."⁸³ Nobody would have leased Plaintiff's industrial property if it had lacked water and sewer service. The value of that service is almost incalculable, but the price of that service has been calculated. Plaintiff should pay it.

Please deny Plaintiff's Application for Leave to Appeal.

⁸² At the risk of excessive repetition, it should be recalled that most of the water/sewer arrearages from Plaintiff's property were timely billed and handed over to the County in 2012 and subsequently. See Exhibits C and D.

⁸³ *Provident, supra*, at 516.

Respectfully submitted,

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